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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GERARD A. MILLER,

Petitioner.

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Second Circuit

REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. THE ONE YEAR TIME LIMIT OF RULE 60 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT RESOLVE THE CONFUSION INHERENT IN THE SEC'S 1992 ORDER AND IN THE OPINION OF THE COURT OF APPEALS.

The issue before the SEC was why petitioner waited "only six years" in bringing his petition; hence petitioner was not given the opportunity to explain "delay" in the SEC record.[1]

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[1] The issue of "delay" goes only to the issue of new evidence, one of the grounds set forth in the petition before the SEC. The other two grounds are petitioner's experience since the cen-

The SEC's Division of Enforcement opposed petitioner's request for relief before the SEC in part because insufficient time had passed between the original censure and the petition for relief. The key language is quoted from the SEC's Enforcement brief:

> In *In The Matter of Munro Silver*, Administrative Proceeding File No. 3-7496 (order of August 9, 1991), the Commission granted relief from a sanction imposed in 1965 that was, in effect, a permanent bar. In *Silver*, nearly thirty years had elapsed since the Commission had imposed sanctions on the respondent. . . . *By contrast, only six years have elapsed since sanctions were imposed upon Miller.*
>
> Jt. App. A276. (Emphasis added).

The foregoing quotation from the SEC's brief in the proceedings below is significant because it reflects with accuracy the principle of the *Silver* case, and SEC policy as set forth in the SEC's Rule 29, 17 CFR 201.29. That rule explicitly states that the SEC looks to the passage of time in evaluating petitions to set aside sanctions barring persons from the securities industry. Moreover, applicable judicial authority is in accord with this view of SEC case law and policy. Thus the Tenth Circuit has noted:

> [I]n instances where the defendant concerned is an individual, and where the alleged vio-

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sure showing compliance; and the impact of the censure on petitioner. (Pet., p. 6). The SEC and the Court of Appeals were silent regarding petitioner's experience since the censure. Both refused to consider the reputational impact of the censure on petitioner.

> lation leading to the injunction was an incident of limited scope or duration, the passage of a substantial period of time with full compliance and with no other violations may be regarded as a significant factor showing a 'change' for these purposes. In reality this is about all an individual can show under these circumstances.
>
> *S.E.C. v. Thermodynamics, Inc.*, 464 F. 2d. 457 (10th Cir.), cert. denied, 410 U.S. 927 (1973).

Despite this precedent, on which petitioner was entitled to rely in determining when to bring his petition, the SEC reversed itself *sua sponte* in the 1992 Order and stated that petitioner waited too long to bring his petition. The SEC cited no authority for this proposition; as it could not, because the authority goes the other way.[2] Indeed, the apparently unseemly haste of the *Swift* petitioners in seeking to set aside the injunction was a development noted by Justice Cardozo. *U.S. v. Swift*, 286 U.S. 106, 112-131, 52 S.Ct. 460, 461-62 (1932). Nor was petitioner allowed any opportunity to develop a record to explain his timing in bringing the petition before the SEC. (Petitioner did emphasize reputational harm in his Reply Brief on appeal. *See* § II, *infra*). Where the record before

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[2] Nor does the new evidence, the Letter of Admonition, implicate the concerns of the Second Circuit regarding faded memories and destroyed records. (Pet., p. 7a). The witness testimony and documents are preserved. Nor did the passage of time cause the SEC to feel constrained about reaching conclusions on the merits after having reviewed the new evidence on the basis of a most summary proceeding below. (Pet., pp. 120-136). There is ample record for a re-evaluation.

the SEC prior to the 1992 Order addressed *not* petitioner's "delay," but instead the apparent prematurity of his petition, it is patently unfair to penalize petitioner for not having developed the record before the SEC to include evidence explaining the "delay."[3]

The SEC's belated reliance on the policy of Rule 60(b) does cause confusion. Prior authority, including the SEC's own procedural rule and case law, and judicial authority, contemplate a petition to set aside a sanction after the passage of some time. In its Opposition Brief, the SEC has selectively promulgated a new rule, without notice, and without opportunity to develop a record before the SEC supporting the reason for the "delay."

II. THE SEC'S CALL FOR JUDICIAL DEFERENCE IS WITHOUT FOUNDATION IN LAW.

The central issue presented is whether the SEC applied an incorrect legal standard in reviewing petitioner's case. This is a question of law, and thus uniquely appropriate for this Court to review. *Federal*

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[3] At oral argument before the Second Circuit, counsel for Petitioner alluded to matters not in the record to explain, in part, Petitioner's timing. If Petitioner is given the opportunity, *e.g.*, on remand, to explain further the timing of his Petition before the SEC, he will supply evidence to show that he was advised by newly obtained counsel in 1986, after the Censure was entered and after the New York Stock Exchange Enforcement Department Letter of Admonition was discovered, that he should wait in bringing a petition to allow for the passage of some substantial amount of time, as contemplated by the SEC's rules and case law, in which to demonstrate his ongoing compliance with SEC Rule 15c3-3. Petitioner's experience since the censure tending to show compliance was ignored by the SEC and the Second Circuit.

Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 90 L.Ed.2d 445, 454 (1986) ("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are . . . for the courts to resolve. . ."); *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971) ("[T]he legal standard to be applied is ultimately for the courts to decide and enforce"). The issue is purely one of law, *i.e.*, construing a series of judicial opinions addressing the question of which standard of review is to be applied in cases such as petitioner's. As the Second Circuit found in *H.W. Wilson Co. v. U.S. Postal Service*, 580 F.2d 33, 37 (2nd Cir. 1978) "[W]hen the *question is one of law* and does not implicate the expertise of the agency, we must provide a *stricter standard of review*. . . . This particularly true when, as in the present case, *the administrator's legal decision is based on his interpretation of a judicial opinion*. . . ." *Id.* at 37 (emphasis added). Citing *Institute for Scientific Information v. U.S. Postal Service*, 555 F.2d 128, 132 (3rd. Cir. 1977). There the Second Circuit concluded that the U.S. Postal Service, *in an administrative proceeding*, had "applied an incorrect legal standard. . . ." *Wilson*, *supra*, at 37. This petition presents the same issue: whether the SEC applied an incorrect legal standard in reviewing petitioner's case. Under the standards of *Indiana Federation* and *Wilson*, *supra*, the question is one for the Court to decide freely. Petitioner does not call upon this Court to review any of the SEC's enabling statutes.

The SEC's reliance upon *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984) is misplaced. The issue in *Chevron, USA* was whether the EPA regulation allowing states to treat all pollution admitting devices within the same industrial grouping as though they were encompassed within a single "bubble" was a permissible construction of the term "stationary source" set forth in the Clean Air Act. The issue concerned not only the substantive statutory provisions relating to such curtailment procedures, but also the underlying technological issues. *Chevron, USA*, *supra*, 467 U.S. at 846-47. Such issues are best left to agency expertise. Clearly *not* in issue in *Chevron, USA*, however, was the question of what standard of review should be applied to a request or petition to modify a sanction,which *Indiana Federation*, and *Allied Chemical*, *supra* control.[4] The SEC's efforts to portray the case as one of statutory interpretation is misplaced twice over, first because it disregards the pure case law issue on appeal, *see*, *Wilson*, *supra*, and second, because to create a statutory issue, it points not to statutory language but rather to Congressional silence. (Opp. Br. p. 6).

When the proper standard of review is applied, the SEC's distinction of *SEC v. Warren*, 583 F.2d 115 (3d Cir. 1978) fails, and the conflict between the Second and Third Circuits is explicit. Here, the SEC contends for the first time, incorporating the error of the Second Circuit, that petitioner seeks to set aside the censure *ab initio* (Opp. Br., p. 7, footnote 3). The Second Circuit merely assumed this unwar-

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[4] Nor is the language in *Indiana Federation* regarding some deference where agency expertise impacts in the standard of review applicable to this appeal, which deals only with a series of injunction cases raising issues traditionally within the scope of the judicial function. *See Wilson*, *supra*, 580 F.2d at 37.

ranted conclusion without foundation in the record, asserting that petitioner seeks to "erase" the censure to "avoid having to disclose it" (Pet. at 7a). This is meritless and contrary to the arrangement assented to with the SEC Division of Enforcement, Office of Chief Counsel.[5] This issue was neither briefed nor argued before the Second Circuit, and the opinion merely assumes petitioner sought such relief. It is unfair and inaccurate for the SEC to contend that petitioner seeks *ab initio* relief where the SEC has access to its own Enforcement Division staff to verify the disclosure arrangement petitioner and his counsel reached with the SEC. Moreover, the Third Circuit noted in *Warren* that an injunction has continuing effects, even if dissolved, including disclosure implications:

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[5] The facts underlying the intended treatment of the relief sought in this case are not in the record. The Second Circuit erroneously assumed that Miller would not disclose the censure. The SEC now places this assumption before the Court. If allowed to establish a record on this new issue, Petitioner would show that Petitioner and his counsel met with the SEC Enforcement Division, Office of Chief Counsel, in April of 1992, prior to the preparation of the Enforcement Division's memorandum opposing Miller's petition before the SEC. At that conference, in response to a question from Colleen Mahoney, Esq., of the SEC, Miller assured the SEC that he would continue to disclose the censure in all appropriate securities industry disclosure forms as an historical fact with a distinct beginning and an end. Even though the SEC Enforcement Division opposed Miller's petition, it never suggested that Miller had no intention of avoiding disclosure of the censure in the future. The Second Circuit's assumption that Miller seeks to "avoid having to disclose it" (Pet. 7a) is unfounded and misplaced. This proffer is made to underscore the unwarranted nature of the SEC's recent contention that Miller seeks *ab initio* removal of the censure.

> Apparently, the injunction once issued does have significant residual effects under the federal securities laws even if dissolved. The Commission asserts that even if the court were to raise or lift the injunction, disclosure of its previous existence may be necessary, and the facts surrounding its dissolution if material to investors should Warren, Jr. become an officer or director of a public corporation.

Warren, supra, 583 F.2d at 122, note 10. Thus, even if petitioner sought relief *ab initio* as characterized by the SEC, which petitioner does not, *Warren* would remain applicable.

The Second Circuit's assertion that the outcome is the same "no matter which standard" (Pet. at p. 5a) applies, does not resolve the conflict issue. First, that statement refers only to *Swift, supra*, and *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31 (2d Cir. 1969). No reference is made to *Warren*. Second, the reason given for denying petitioner's appeal, "no matter which standard" applies, is "delay." This emphasis on delay *is* an application of the *Swift* standard through its progeny. The stated reason for the "delay," was to show evidence of reputational harm. This factor—reputational harm—is appropriate for consideration under *Warren*. In refusing to consider reputational harm, the Second Circuit and the SEC followed the Tenth Circuit's application of *Swift* in *SEC v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304 (10th Cir. 1970) (holding that reputational harm is not sufficient to meet the standard of *Swift*). (Pet., p. 6a). This circular reasoning—application of *Jan-Dal* and *Swift* to support a refusal to consider reputational

harm as a rationale for purportedly refusing to consider a standard other than *Swift*—is erroneous. This error, and the refusal to apply the *Warren* standard, which would allow consideration of reputational harm, is the central legal error of the SEC's order and the Second Circuit's opinion. Without acknowledgement, the Second Circuit has applied *Swift* through *Jan-Dal*. In so doing, it has disregarded *Warren*. Thus the assertion that the Second Circuit "neither approved nor rejected the Commission's use of the *Swift* standard" (Opp. Br., p. 6) is erroneous. Clearly a conflict in the Circuits exists.

Moreover, the question of delay goes only to the issue of the new evidence. It has no impact on the other grounds raised by petitioner: petitioner's "experience since the censure" having demonstrated petitioner's compliance with the SEC's Rule 15c3-3, and the "continuing negative impact" of the censure on petitioner. (Pet., p. 6). *Warren* took into account the non-reoccurrence, or isolation, of violations. (Pet., p. 11). The Order of the SEC and the Opinion of the Court of Appeals are *silent* on the question of petitioner's experience since 1986. And, as noted, neither the SEC nor the Second Circuit considered reputational harm, following *Jan-Dal*, which in turn, implements the *Swift* standard. As noted, such harm is a basis for relief under *Warren*.

Nor is the Third Circuit's post-*Warren* application of *Swift* standard relevant, where the two cases in question (Opp. Br., p. 6, note 3) concerned petitioners who sought relief to act in derogation of the original order. C.A. Reply Br. at 7. The SEC admittedly draws no distinction between petitions seeking relief to permit action in derogation of the original order, and

those, such as the current petitioner's, which do not. Petitioner's reliance on the cases limiting *Swift* is proper, as each of the cases stands for the proposition that *Swift* should be limited to its facts. Pet. pp. 20-21; Opp. Br., p. 7, footnote 4.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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